JD–8–03
Warren, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

REYNOLDS ELECTRIC, INC.

and Case 7–CA–44926

GABRIEL T. RICE

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for the General Counsel.
Thomas Williams, Esq.
of Detroit, Michigan, for the Respondent.
Gabriel T. Rice, Pro Se

DECISION

Statement of the Case

IRA SANDRON, Administrative Law Judge. Based on a charge filed by Gabriel T. Rice on March 15, 2002, a complaint and notice of hearing was issued in this matter on June 24, 2002. The General Counsel alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by laying off Gabriel T. Rice and George V. Hebb V on October 23 and 31, 2001,[1] respectively, and failing to recall them, because they engaged in protected concerted activities. The Respondent, by its answer, denied the commission of any unfair labor practices.

Pursuant to notice, a trial was held before me in Detroit, Michigan, on October 8, 2002, at which the General Counsel and the Respondent were represented by counsel. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The General Counsel and the Respondent filed posthearing briefs, which I have duly considered.

On the entire record in this case, including my observations of the witnesses and their demeanor, I make the following

Findings of Fact

I. Jurisdiction

The Respondent is a Michigan corporation with an office and place of business in Warren, Michigan, where it is engaged in the electrical contracting business. During the calendar year ending December 31, 2001, the Respondent, in conducting its business operations, provided services valued in excess of $50,000 to the United States Government.

[1] All dates are in 2001 unless otherwise indicated.

The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Alleged Unfair Labor Practices

The witnesses for the General Counsel were Rice and Hebb, and former employee Kelly Barnard. The witnesses for the Respondent were its President and owner, Russell T. Reynolds Jr. and employee Nicholas Schaefer.

Former Supervisor Edward M. Whitcher, who was admitted to be a supervisor within the meaning of Section 2(11) of the Act and an agent of the Respondent under Section 2(13) of the Act, was not called by the Respondent. The General Counsel, in its posthearing brief (at p. 9, fn. 8), asks that an adverse inference be drawn from the Respondent's failure to produce Whitcher, arguing that Reynolds testified that Whitcher's parting from the Respondent was amicable and that Whitcher's presumptive favor toward the Respondent was not challenged.

More precisely, Reynolds testified that Whitcher's departure was a result of "a mutual agreement between [us]" (Tr. 170). It is well established that drawing an adverse inference from a Respondent's failure to call a former supervisor is inappropriate in the absence of a showing that it would be reasonable to assume that he or she is favorably disposed toward the Respondent. *Reno Hilton*, 326 NLRB 1421 fn. 1 (1998); *Irwin Industries*, 325 NLRB 796, 811 fn. 12 (1998); *Goldsmith Motors Corp.*, 310 NLRB 1279, 1279 fn. 1 (1993); *Property Resources Corp.*, 285 NLRB 1105 fn. 2 (1987), enfd. 863 F.2d 964 (D.C. Cir. 1988). This would seem to be based on the logical premise that, depending on the circumstances of his or her separation, the former supervisor might be hostile to the respondent rather than favorable. The evidentiary burden clearly rests on the party requesting that an adverse inference be drawn.

Reynolds' statement about Whitcher's separation was conclusionary and vague and falls short of showing that it would be reasonable to assume that Whitcher is favorably disposed, rather than antagonistic, toward the Respondent. Accordingly, I decline to draw an adverse inference from the Respondent's failure to call him. Regardless, statements attributed to him by Rice and Hebb went unrebutted.

The Respondent performs mostly commercial and industrial type work, with some residential jobs. Some of its contracts with governmental entities have been on prevailing wage rate jobs, and on those, the Respondent has paid a higher wage ($18.50 an hour, at all times material). It has always been a nonunion company.

On June 19, the Respondent entered into a purchase order contract in the amount of $134,000 with general contractor Bernco, Inc., providing that the Respondent, as a subcontractor, perform work at the Schoenhals Elementary School (the school).[2] Reynolds testified that not all public school contracts are prevailing wage jobs. The parties stipulated that there was nothing in the job specifications referencing prevailing wage, nor was there was anything in the contract concerning the matter. Reynolds testified that he did not know at the time of the contract that the school job was, in fact, a prevailing wage job, and I will credit his testimony on this point.

[2] R. Exh. 7.

It was stipulated that the personnel records of Rice and Hebb, provided by the Respondent pursuant to subpoena, do not contain any documents constituting performance evaluations, disciplinary notices, or warnings, with the exception of one note in Hebb's file dated October 4, 2001.[3] This note, handwritten by Whitcher, apparently resulted from a conversation initiated by Hebb and states that Whitcher explained that he (Hebb) was doing good but needed to listen to the job runner and work together. On its face, it does not rise to the level of a disciplinary notice or warning.[4] In any event, Reynolds testified that Hebb was a "pretty good" employee (Tr. 156) and that the sole reason that Hebb and Rice were laid off was a slowdown in work. It was further stipulated that the personnel files of Hebb and Rice do not contain separation notices such as the one in Dennis White's personnel file, in which the "Lack of work" box is checked as the reason for separation.[5]

When Rice and Hebb were hired as apprentice electricians in August and on June 15, respectively, there were six other apprentices and three journeymen electricians. Whitcher verbally assigned work each morning, and the men worked with different crews. They were frequently taken off jobs before completion, to work on other jobs. Both started working at the school the first week they were hired, and they continued to work there off and on until the dates that they were laid off. Rice and Dennis White worked at the school the most consistently, but all employees worked there at one time or another. Hebb performed about 200 hours of work at the school. Neither Rice nor Hebb were ever told that they were hired for only one job. Rice's normal pay was $14 an hour; Hebb was hired at $15 an hour but requested and received a pay raise to $16 an hour, after approximately 1-½ months. They both were paid $18.50 an hour for work they performed at the U.S. Tank Plant, which the Respondent knew to be a prevailing wage job.

Rice engaged in all aspects of electrical work, including blueprint reading, layout work, general pipe runs, and installing wires and electrical devices. In addition to working at the school and at the U.S. Tank Plant, Rice and Hebb worked on other jobs for the Respondent. Thus, Rice worked at a car dealership, DeCal, Dot's Concepts, and a couple of residential jobs; and Hebb worked at PGAM, Roy O'Brien Ford, a factory, and other public schools.

Workers of other subcontractors to Bernco were at the school, and they told Rice and other employees of the Respondent that they were unionized and that the job was a prevailing wage job. Prior to his layoff, Rice had many conversations about this with coworkers, primarily Hebb but in passing with Barnard and Dennis White, and also with Bernco Superintendent Don (last name unknown) and Supervisor Whitcher. Schaeffer, who has been employed by the Respondent as an electrical apprentice since October 1999, testified that carpenters working at the school job talked about it being a prevailing wage job starting in late August or early September, and that it was common knowledge among the Respondent's employees.

Rice had approximately 12 conversations with Whitcher on the subject, the first in around mid- or late September. These took place after the completion of the day's work, most at the jobsite, some at the Respondent's shop in Warren. Rice initiated these brief (at most five-minute) conversations and normally would tell Whitcher that the carpenters on the school jobsite were telling him that it was a prevailing wage job. Rice would ask Whitcher if it was a prevailing wage job, to which the latter replied no. Rice related Whitcher's response to the carpenters and

[3] GC Exh. 5.

[4] Contrast, GC Exh. 7, an "Employee Warning Notice" issued to an employee on January 4, 2002, and signed by both the supervisor and the employee.

[5] GC Exh. 6.

Don. On September 19 or 20, after speaking with Don, Rice told Whitcher that Don stated that it was a prevailing wage job. Whitcher replied that he would check into it, but Rice never heard back from him.

Rice was paid $14 an hour for work at the school. During the week of September 3–7, he received $14 an hour for the eight hours he worked at the school, and $18.50 an hour for the 20 hours he worked at the DeCal job.[6] However, the following week, his pay went back to $14 an hour for all of his hours. When he asked Whitcher about this, Whitcher responded that his being paid $18.50 an hour the previous week was the result of a clerical error. Rice was never asked to pay back the overpayment, and it was never deducted from his subsequent paychecks.

There apparently was some confusion in Rice's mind as to what work the $18.50 an hour related to, since he told other employees at the time that he was paid prevailing wage for work at the school job. In the absence of other evidence that the Respondent was deliberately seeking to provide Rice with a benefit to secure his silence, I decline to find any improper motive in his extra payment for DeCal work and will not use such as a factor in determining the lawfulness or unlawfulness of the layoffs in issue. On the other hand, I do not find that Rice's error was intentional or that he was purposefully trying to misstate the facts on this matter during his testimony.

Rice was laid off on October 23. He was working on the school that day, when he and White were asked to return early to the shop. Whitcher saw White first in his office. When Rice went in, Whitcher said he had laid off White for lack of work and was laying off Rice for the same reason. He told Rice that the Respondent was pulling out of the school job and that Rice would be hired back if the school job resumed or if there was other work. Rice stated that there were employees with less seniority than him (at least one employee, by the name of Matt, had less seniority than Rice or Hebb but was not laid off when they were). Whitcher did not respond.

Rice testified that he also was working at DeCal the week he was laid off. Further, at the time, the company was performing jobs at other locations, such as the car dealership, tank plant in Warren, McNamara Federal Building, other public schools, and a factory. Rice had worked at the car dealership and the tank plant. He had also worked approximately 32 hours of overtime on Saturdays at the school, from August through October. Other employees, including Hebb, White, Barnard, and Schaeffer also worked overtime on Saturdays at the school. At the time of Rice's layoff, there was at least one or two months left on the school project, and at the end of November, he and Hebb drove by the school and observed that electrical work was still being performed. Rice was never recalled.

In November, Rice filed a prevailing wage rate claim with the applicable State agency, which subsequently determined that the school job was, in fact, a prevailing wage rate job, and informally resolved the matter with the Respondent.[7]

Rice was a credible witness. He answered questions directly and readily and did not appear to make any efforts to embellish or exaggerate.

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[6] See GC Exhs.12 and 13.

[7] See GC Exh. 4, letter dated June 27, 2002, to Hebb from the Michigan Department of Consumer & Industry Services, Wage and Hour Division.

Hebb testified that after Rice advised him that the carpenters had said the school was a prevailing wage job, he had a conversation with Whitcher in late July or early August.[8] Hebb asked if the school was a prevailing wage job, and Whitcher said no.

After Rice's layoff, Hebb and Schaeffer were assigned to the school job. Hebb testified that at the time Rice was laid off, there was a good 2 to 2-½ months of work remaining there. A few days or so after Rice and White were laid off, Hebb suggested to fellow employees Schaeffer and Dave Slone that they speak to Whitcher on the subject of prevailing wage. They went to Whitcher's office, where all three employees spoke. They stated that they had heard from Bernco Superintendent Don that the school job was a prevailing wage job and that Rice had been paid prevailing wage. Hebb asked to see Rice's pay stubs. Whitcher slammed down some papers and denied that Rice was paid the prevailing wage rate. Whitcher said he would go out to the jobsite and ask Don, and they all could have a meeting the next morning. Whitcher called Rice a liar and "pretty much bad-mouthed" him (Tr. 59).

When I asked Hebb to be as specific as possible in relating what Whitcher said about Rice, Hebb testified: "Well, he [Whitcher] said he [Rice] was a piece of s— . . . . [H]e wasn't any good. And he's telling you guys lies. He's trying to get you guys to go against us" (ibid).[9]

The following day, Whitcher came to the jobsite and went into Don's office for about 20 minutes. Afterward, he came back and told Hebb and Schaeffer that they could have a meeting with Don, but it was not a prevailing wage job. They replied okay, that they believed him. Schaeffer and Hebb then went to Don's office, where Don explained, "I put my foot in my mouth" (Tr. 63) and said it was not a prevailing wage job.

The next day, October 31, bricklayers told Hebb that there was a man from the State of Michigan onsite, checking to see if the workers were being paid prevailing wage. Hebb went over to the State Representative, Don Mustonen. He told Mustonen his trade. Mustonen asked if he was getting paid $26 an hour, to which Hebb responded no. Mustonen confirmed telephonically that it was a prevailing wage job. He gave Hebb paperwork and told him to take it to the CIS (Consumer & Industry Services). During this conversation, Don was standing about 20 feet away, and he and Hebb had eye contact.

After the conversation, Schaeffer received a phone call from Whitcher. Schaeffer's version of what was said therein and what happened afterward was inconsistent with Hebb's. According to Hebb, Schaeffer stated that the Respondent knew the "guy from the state" (Tr. 67) was out there and for them to come back to the shop immediately. According to Hebb, they were never before ordered off the site like that. Schaeffer testified, on the contrary, that Whitcher told him there was nothing else for him and Hebb to do on the job because the bricklayers were still building walls. He further testified that having to leave early was a

[8] The date is potentially inconsistent with Rice's testimony that he first spoke to Whitcher in mid- or late September, but such a discrepancy in dates is not unusual, particularly when neither man knew at the time of the conversations that they would later be of evidentiary importance. In any event, the discrepancy is not material to the issues in this case.

[9] Schaeffer, who is still employed by the Respondent, was called as Respondent's witness. On cross-examination, he testified that he was present at such a meeting, in which there was discussion of the status of the school job in terms of prevailing wage, and of Rice. Significantly, the Respondent's counsel did not elicit from Schaeffer any details of what was said in this meeting. As noted earlier, Whitcher was not called to testify. Accordingly, Hebb's testimony regarding the conversation, including statements Whitcher made about Rice, is unrebutted.

frequent occurrence. Schaeffer testified that they went to the shop before going home but that he was not privy to any conversation between Whitcher and Hebb that day.

According to Hebb, both he and Schaeffer went back to the shop and met with Whitcher and Reynolds. Hebb showed Reynolds the CIS paperwork. He asked Reynolds why they had been summoned to the office in the middle of the day. Reynolds replied that he had to pull them off the site because he did not want to look guilty. He further stated that he knew that somebody had called the State on him. Reynolds further stated that he was going to sue Bernco because they did not tell him it was a prevailing wage job and he was going to have a lawsuit against them. Reynolds also said that he knew that Rice had called the State on him, and that "he [Reynolds] was going to beat the s— out of him, if he was here, he'd kick his ass, and, hopefully, [Rice had] a lot of money because he's going to have a lawsuit against him" (Tr. 70). Schaeffer stated that he would work for Reynolds and do whatever he said. Reynolds asked Schaeffer to accompany him to his office. Afterward, Reynolds returned and told Hebb that he was being laid off until everything got cleared up with the job. He stated he would call Hebb at the end of the day and get him back to work.

Reynolds called Hebb that afternoon. Reynolds told Hebb that he (Reynolds) knew that Hebb had called the State on him and that he could not have people like Hebb working for him. Hebb testified that Reynolds accused him of "trying to mess with me" (Tr. 73) and said he would not get a dime out of him. Reynolds kept saying that he was going to get Rice, that Rice needed to watch out, and that Hebb should stay away from Rice. The conversation was heated, and Hebb hung up on him.

Hebb was never recalled. At the time of his layoff, there was about 1-½ months of work left on the school job. The Respondent's other jobs at the time included O'Brien Ford, other public schools, the McNamara Federal Building, the U.S. Tank Company (two or three separate projects), and PCAM. Hebb had worked on all of these jobs.

Following his layoff, Hebb called Reynolds on three occasions, asking for timecards in connection with his State wage claim. The first occurred about one month after Hebb's layoff. Reynolds told him that he was going to fight him all the away and said he hoped Hebb had a good lawyer. In the second conversation, about a month thereafter, Reynolds stated that he would not provide the information and repeated that he would fight him.

The last of the conversations occurred in approximately late February 2002. Reynolds began by saying that he wanted to work things out and for Hebb to stay away from Rice, because Reynolds was going to sue him. Hebb responded that that was between him and Rice. Hebb asked for his timecards, and Reynolds replied no. Hebb testified that the conversation "ended pretty bad" (Tr. 78), with Reynolds saying,

> . . . like you're a piece of s—, you're lazy, you're a dime a dozen in my book, and just started saying all kinds of stuff to me, and I was pissed off then and I said, you know, f— you, you know, and he said f— you, you a— , and started just going off on me, and I said, well, the conversation's taped. And that's when he hung up on me" (ibid).

I credit Hebb's version of the conversation over Reynolds, who denied having any telephone conversations with Hebb in which profanity was used. In addition to my general credibility findings, I observed during the hearing that both Hebb and Reynolds exhibited marked irritation and impatience during cross-examination. Both struck me as being easily provoked and somewhat volatile. I agree with Respondent's counsel's statement on page 14 of

his brief that much of this case hinges on whether Hebb or Reynolds was the more believable witness; however, I disagree with his conclusion that Reynolds was the more credible.

Although Hebb was prone to rambling and getting off track during his testimony—he had to be reminded to focus his answers—I believe he was candid and credible. For numerous reasons, I cannot say the same for Reynolds. Whitcher was not called to testify. Schaeffer, called as a witness by the Respondent, was partially credible. However, as a current employee who has been retained when others were laid off and not recalled, he would have reason not to be fully forthcoming about the events of October 31. Therefore, I credit Hebb's unrebutted testimony as to his conversations with Whitcher, as well as his testimony where it conflicted with that of Schaeffer and Reynolds.

Kelly Barnard, an electrical apprentice, was also laid off on October 31 and has not been recalled. He testified that Reynolds told him at the time of his layoff that things were not going right at the school job and that he was stopping it. Reynolds also stated that he had to lay off Hebb. Once things picked up, Reynolds said, he would rehire employees but, "I'm not going to bring people back that act the way [Hebb] did this morning" (Tr. 114). The day after his layoff, Barnard observed Schaeffer and Slone working at the school site. Prior to his layoff, he had not observed any slowdown in work at the school. Barnard recalled a conversation in which Whitcher stated that work was getting slow, and they would have to lay people off, but this occurred after Rice and Hebb had already been laid off. Barnard appeared to be candid and to testify truthfully, he is not named in the complaint as a discriminatee and does not stand to benefit financially from the outcome of this case, and his testimony was consistent with the credited testimony of other witnesses. I therefore find him a credible witness.

Schaeffer testified that although he was taken off the school job on October 31, after about three weeks, he and Slone returned back to work there for a period of approximately a month. There was never a point when the Respondent had no work.

Reynolds testified in detail. His testimony was rife with contradictions and inconsistencies, he professed ignorance of his employment practices when his knowledge of such would be reasonably expected of the owner of a small business, his testimony was impeached by statements in his affidavit to the NLRB or by documents the Respondent submitted pursuant to subpoena, and he was frequently evasive and/or nonresponsive. For all of these reasons, I do not find him to have been credible. He testified as follows.

Since 1988, the maximum number of employees employed by the Respondent has been 15 or 16. There were between 12 and 13 in July. There are currently nine employees, including Reynolds and the secretary. Whitcher left the Company, and Reynolds is now in charge of supervision. Reynolds testified on direct examination that he has not replaced Rice or Hebb. However, on cross-examination, when asked the same question, Reynolds answered, "That could be true" (Tr. 174). Upon being shown General Counsel's Exhibit 3, a list of employees furnished by the Respondent pursuant to subpoena, he admitted that it reflects that five employees were hired after the October layoffs, all between January and August 2002.

Reynolds testified that the first time he had notice that the school job was a prevailing wage project was the Friday following Hebb's layoff on October 31, when Hebb came to get his paycheck and brought a pamphlet. According to Reynolds, Hebb said he was trying to work it out with Whitcher, and Reynolds stated he would try to get to the bottom of it. Thereafter, Reynolds spoke with Whitcher, who said he had heard it both ways. Reynolds then contacted Bernco.

I find this testimony incredulous. I credit Rice's unrebutted testimony that he had numerous conversations with Supervisor Whitcher on the subject going back to at least mid- or late September and Hebb's unrebutted testimony that Whitcher displayed animus against Rice for raising the issue prior to Hebb's layoff. Significantly, the Respondent's own witness, Schaeffer, testified that it was common knowledge among the employees as early as mid-August or September that other employees at the school were receiving prevailing wage pay. I cannot believe that Reynolds did not have awareness of the issue far earlier than he alleged, certainly prior to the date that Rice was laid off. I have to conclude, therefore, that, on notice that he might be underpaying his employees, he chose to pay a lesser wage rather than take the simple steps necessary to determine whether or not he was paying them what they were entitled to.

Reynolds' testimony concerning when the decisions were made to lay off employees was hopelessly inconsistent and confusing to the point where it was a muddle. He first testified that when he returned from his honeymoon, in approximately late September, Whitcher told him that "the bottom had, basically, fallen out" in their business (Tr. 158). He proceeded to testify that at that time (late September), Reynolds said they had to make a decision, and they selected White and Rice to be laid off.

However, Reynolds soon after testified that they made the decision to lay off White and Rice during the same week that they were laid off (the week of October 23). Later, on cross-examination, he testified that the decisions to lay off Rice and Hebb were not made "until the days that they were laid off" (Tr. 188). On cross-examination, he testified at one point that the decision to lay off two employees on October 23 was made earlier that week, but he testified at another point that the decision to lay off two people on October 23 was made "about an hour or two before they were laid off" (Tr. 191).

As to who made the decision to lay off selected employees, Reynolds was evasive. On cross-examination, when asked whether he participated with Whitcher in selecting people to lay off, Reynolds answered, "I can't say I had the final decision on that" (Tr. 183). The General Counsel then produced Reynolds' affidavit to a Board agent, given with counsel present. Reynolds confirmed that he stated therein that he and Whitcher together made the decisions to lay off Rice and Hebb.

Reynolds testified that seniority was not used as a factor in determining layoffs; rather, it was solely a matter of management discretion. I specifically asked Reynolds what factors he used in selecting the four employees laid off on October 23 and 31, as opposed to the five or six who were retained. Reynolds gave a nonresponsive answer, talking about the school project being a problem. Reynolds, on cross-examination, confirmed that in his affidavit to the Board agent, he stated, "There was no particular reason why we picked Rice" (Tr. 184). Thus, I find that the Respondent has utterly failed to articulate any reasons why Hebb and Rice were selected for layoff.

On cross-examination, Reynolds was asked if there was a policy of offering employees as much notice as possible of layoffs. He replied, "I'm not really aware of that" (Tr. 188). The General Counsel then pointed out that policy 208 of the Respondent's handbook [10] provides, in paragraph 3, "Employees selected for layoff will be given as much notice as is required by law or as much as is reasonable under the circumstances." He then admitted that Rice and

[10] GC Exh. 2.

Hebb were given no advance notice of their layoffs but offered the explanation that they were not selected for layoff until the days that they were actually laid off.

There were four men who worked on the school job prior to the October 23 and 31 layoffs (Hebb, Rice, Slone, and White). At any one time, the maximum was four. After the layoffs, there was usually one, at most two. About 300 to 350 or more hours of work was done on the school job after October 23. Work there was completed a couple of weeks prior to the hearing, with a final inspection pending.

When asked on cross-examination whether Rice or Hebb were hired just for one job, Reynolds first replied, "Well, that I don't know for a fact . . . but it's very possible" (Tr. 180). He soon stated that when they got the school job, they needed men, and, "So I'm going to say yes, they were for that job" (Tr. 181). The General Counsel then impeached Reynolds' testimony by quoting from the affidavit Reynolds gave to the Board agent: "None of the four men [who were laid off on October 23 or 31] were hired to work on only one particular job" (Tr. 182).

Although Reynolds testified that he never had any objection to paying a prevailing wage rate, the General Counsel on cross-examination showed him March 4, 2002 letters from the Respondent's law firm to Rice and Hebb,[11] stating, inter alia, that their contention that they were owed additional pay was misplaced and that the school job was not a prevailing wage job, and threatening them with legal action. Reynolds professed ignorance of the contents of the letters written on his behalf by counsel, testimony I find to constitute yet another reason why he was unreliable as a witness. I must assume, in the absence of any reason to conclude otherwise, that the Respondent's counsel accurately reflected Reynolds' position as client and principal.

Discussion and Conclusions

Pursuant to Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid and protection. Concomitantly, an employer may not, without violating Section 8(a)(1) of the Act, discharge or otherwise threaten, restrain, or coerce employees because they engage in such activities. *Senior Citizens Coordinating Council of Co-op City,* 330 NLRB No. 154 (2000).

The discharge of an employee will violate Section 8(a)(1) if the employee was engaged in concerted activity (i.e., activity engaged in with or on the authority of other employees and not solely on his or her own behalf), the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the discharge was motivated by the employee's protected concerted activity. *In re Triangle Electric Co.*, 335 NLRB No. 82 (2001), citing *Meyer Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*)[12]; see also *KNTV, Inc.*, 319 NLRB 447, 459 (1995).

The first issue, therefore, is whether Rice and Hebb engaged in "concerted activity." Rice testified that he spoke with various other employees about the matter of prevailing wage rate. Hebb testified that he initiated a conversation on the subject between him, Schaeffer, and Slone and Supervisor Whitcher and, indeed, Schaeffer confirmed that such a conversation did

[11] GC Exh. 11.

[12] Remanded, 755 F.2d 941 (D.C. Cir. 1988), cert. denied 474 U.S. 948 (1985), and 474 U.S. 971 (1985); on remand (*Meyers II*), 281 NLRB 882 (1986), affd. 835 F.2d 1481 (D.C. Cir. 1987); cert. denied 487 U.S. 1205 (1988).

occur. It is evident, therefore, that Hebb engaged in activity with other employees, thereby satisfying the necessary element that the activity was "concerted."

The fact that Rice was unaccompanied at all times that he raised with Whitcher the issue of prevailing wage does not preclude a finding that his actions were concerted. The Supreme Court has held that the acts of a single employee can be found to come within the ambit of protected concerted activities covered by Section 7 of the Act. *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984). As the Court stated (at page 831):

> Although one could interpret the phrase, 'to engage in concerted activities,' to refer to a situation in which two or more employees are working together at the same time and the same place toward a common goal, the language of § 7 does not confine itself to such a narrow meaning. In fact, § 7 itself defines both joining and assisting labor organizations—activities in which a single employee can engage—as concerted activities (footnote omitted).

See also *Mainline Contracting Corp.*, 334 NLRB No. 120 (2001).

Meyers requires, nevertheless, a showing that the individual's actions, although taken alone, were preceded by the individual's interaction with other employees sharing a commonality of interest. As the Second Circuit Court of Appeals stated in *Ewing v. NLRB*, 861 F.2d 353, 361 (1986):

> The *Meyers* rule prevents personal gripes relating to job conditions and the purely individual invocation of statutory workplace rights from coming within section 7's definition of 'concerted activit[y.]" But it may well be another matter when to the employees on the jobsite, the subject of the complaint itself has been a topic of group concern that can be proven at an administrative hearing.

In the instant case, the prevailing wage rate was a benefit that would have applied to all of the Respondent's employees on the job, not just Rice alone. Obviously, all of the employees had a strong interest in finding out whether they were entitled under the law to higher wages. Rice did discuss the matter with other employees prior to at least some of his conversations with Whitcher, and Schaeffer testified that it was common knowledge among the employees in mid-August or September that there was an issue of whether they were being properly paid. I find, therefore, that Rice's actions, although done individually, were taken on behalf of the employees as a group.

Rice's lack of express authorization from other employees to contact management does not change this conclusion. The Board has recognized that an employee's individual conduct may be deemed concerted in nature by virtue of the employee being implicitly authorized to take action on behalf of other employees, once there has been established the existence of a common complaint or concern which transcends the interests of that employee alone. *Every Woman's Place, Inc.*, 282 NLRB 413 (1986). The Sixth Circuit Court of Appeals has also adopted the principal that it is not necessary for an employee to be appointed or formally chosen by fellow employees to represent them, in order to be found to have engaged in concerted activity on their behalf. See *NLRB v. Main Street Terrace Care Center*, 281 F.3d 531, 539 (6th Cir. 2000); *Talsol Corp.*, 155 F.3d 785, 796 (6th Cir. 1998). Here, the fact that Schaeffer and Slone later accompanied Hebb to inquire of Whitcher on the subject indicates that Rice's earlier inquiries had at least the tacit support of his coworkers. In any event, it would defy logic to assume that any of the employees on the job, who had discussed the issue among

themselves, were not supportive of someone trying to find out whether they were all entitled to higher pay.

In light of all of the circumstances set forth above, I conclude that Rice's initiation of conversations with management about proper wage for employees on the school site was concerted in nature.

The second question is whether the Respondent knew that such activities were concerted. Again, with regard to Hebb, there can be no dispute. He and other employees initiated a conversation with an admitted supervisor and agent, Whitcher, on the issue of prevailing wage rate. Moreover, this conversation followed Rice's numerous conversations with Whitcher on the subject, as well as Rice's layoff on October 23.

With regard to Rice, he was alone at all times when he raised the subject with Supervisor Whitcher. He stated to Whitcher that others at the school job said it was prevailing wage and asked if it was. Based on his testimony, he did not expressly articulate whether his inquiries were limited to him or encompassed other employees. Since Whitcher was not called as a witness, he could not be questioned about his understanding of the scope of Rice's inquiries.

In this circumstance, I believe it appropriate to use a reasonable person standard, more specifically, to determine whether or not a reasonable person standing in Whitcher's position would have concluded that Rice was acting solely on his own behalf or was representing the interests or wishes of other employees. As the Board stated in *Aroostook County Regional Opthomology Center*, 317 NLRB 218, 220 (1995) enfd. in part 81 F.3d 209 (D.C. Cir. 1996), wages are a "vital term and condition of employment, probably the most critical element in employment." If the job was prevailing wage, then not only Rice but all other employees would have been entitled to the additional pay rate. The obvious interest the employees had in the matter is demonstrated by Schaeffer's testimony that in mid-August or September, the issue was common knowledge among them.

Therefore, I believe that Whitcher would reasonably have concluded that Rice's inquiries about prevailing wage rate represented collective concern, rather than only his interests as an individual employee. Accordingly, I conclude that the Respondent had knowledge—constructive, if not actual--of the collective nature of both Rice's and Hebb's activities.

The third step of the inquiry is determining whether the activity—pursuing the matter of proper wage with the responsible State agency, the general contractor, and management—was protected activity. It is axiomatic that wages constitute a key term and condition of employment, and the Board has held that discussion of wages constitutes protected concerted activity, because wages,"probably the most critical element in employment" are "the grist on which concerted activity feeds." *Aroostook County Regional Opthomology Center*, supra at 220. Accordingly, this element of the *Meyers* test is satisfied.

The final issue is whether the layoffs of Rice and Hebb were motivated by their engagement in protected activity. For reasons previously stated, I credit Hebb's testimony that Whitcher and Reynolds expressed anger at Rice for, in essence, challenging the amount of pay employees were receiving, and his testimony that Reynolds expressed hostility toward him for his contact with the State regulatory agency representative at the jobsite. I note again that Whitcher was not called as a witness and that Hebb's versions of his statements were not rebutted, and I reiterate that Reynolds was a very unconvincing witness. I also note here that

Barnard testified that on October 31, Reynolds made comments to him about not rehiring Hebb because of his "attitude earlier that morning."

I have found that the Respondent had knowledge of the protected concerted activities of Hebb and Rice and demonstrated animus toward them because of such activities. The timing of their layoffs, particularly Hebbs' (the same day he had a conversation with the State agency representative) was highly suspicious. I find, therefore, that the General Counsel has satisfied the first prong of analysis under *Wright Line*, 251 NLRB 1083 (1980), establishing a prima facie case of unlawful layoffs.

The second step under *Wright Line* is to determine whether Rice and Hebb would have been laid off and not rehired despite any considerations related to their protected concerted activities. Put another way, has the Respondent successfully proven its contention that valid economic reasons justified laying them off and not recalling them?

The answer is clearly no. Undisputed evidence reflects that the Respondent was performing other jobs in October and continued them. I credit Barnard's testimony that the day after October 31, he saw Schaeffer and Slone working at the school. However, even fully crediting Reynolds and Schaeffer, the school job, after an hiatus of three or so weeks after October 31, resumed and continued up until only a couple of weeks prior to the hearing on October 8, 2002. Additionally, although Reynolds testified on direct examination that Hebb and Rice were not replaced, he admitted on cross-examination that General Counsel's Exhibit 3 shows that five new employees were hired in 2002, even though Hebb and Rice were never recalled.

Even if the Respondent were able to show valid economic reasons for layoffs in October and for a reduction in the number of employees since then, it could not show that Rice and Hebb would have been selected for layoff but for their protected concerted activities. In neither Reynolds' affidavit to the Board agent nor his testimony did he ever articulate any reasons why he selected them to be laid off, even though I expressly asked him why they were chosen for layoffs while other employees (including at least one with less seniority) were not. Reynolds testified that their layoffs had nothing to do with any problems with their performance. Thus, the record is devoid of any explanation of why the Respondent selected Rice and Hebb for layoff. In the total absence of any proffered justification, it must be inferred that the sole reason was that they questioned the amount of pay they and other employees were receiving for their work on the school job.

Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act by laying off and not recalling Rice and Hebb because they engaged in the protected concerted activity.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by laying off Gabriel Rice on October 23, 2001, and George Hebb V on October 31, 2001, and thereafter failing and refusing to recall them, because they engaged in protected concerted activities.

3. By the conduct described in paragraph 2, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily laid off employees Rice and Hebb, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER [14]

The Respondent, Reynolds Electric, Inc., Warren, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist

(a) From laying off, failing to recall, or otherwise discriminating against any employee for inquiring of a Government agency, general contractor, or the Respondent, whether work being performed by its employees should be paid at the prevailing wage rate, or for otherwise engaging in protected concerted activity.

(b) From, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Gabriel Rice and George Hebb V full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

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[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[14] The following corrections are hereby made to the transcript:
Tr. 25, L. 25 – change "$100" to "$14."
Tr. 26, L. 10 – change "$81.50" to "$18.50."
Tr. 30, L. 13 – change "else" to "less."
Tr. 58, L. 20 – change "is" to "was."
Tr. 69, L. 16- change "statement" to "state."
Tr. 140, L. 3 – change "job" to "not."
Tr. 174, L. 15- change "about" to "after."

(b) Make Rice and Hebb whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Warren, Michigan, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 23, 2001.

Dated, Washington, D.C., January 24, 2003.

_____
Ira Sandron
Administrative Law Judge

[15] If this Order is enforced by a judgment of the United States court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT lay you off, fail to recall you, or otherwise discriminate against you because you inquire of a Government agency, a general contractor, or us about whether you and other employees on a job should be receiving pay at the prevailing wage rate.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board’s Order, offer Gabriel Rice and George Hebb V full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Rice and Hebb whole for any loss of pay or other benefits suffered as a result of our unfair labor practices.

REYNOLD'S ELECTRIC, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

477 Michigan Avenue, Federal Building, Room 300, Detroit, MI 48226-2569

(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (313) 226-3244.